TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	1
A. The Facts	1
B. The Proceedings Below	7
SUMMARY OF ARGUMENT	10
ARGUMENT	11
I. THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED BECAUSE ANY RULING ON THE SOLE ISSUE PRESENTED BY MILKOVICH FOR REVIEW WOULD BE ADVISORY	11
A. The Lower Courts Held that Milkovich, a Nationally Acclaimed Wrestling Coach and Public School Teacher, Is Both a Public Figure and a Public Official—a Ruling Milkovich Has Not Challenged	11
B. The Lower Courts Ruled that Milkovich Had Failed to Prove Either Actual Malice or Negligence, and Milkovich Has Not Challenged Such Rulings	14
C. Any Ruling on the Federal "Opinion" Issue Would Be Advisory	16
II. THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED BECAUSE THE OHIO SUPREME COURT EXPRESSLY BASED ITS CONCLUSION THAT THE COLUMN IS PROTECTED OPINION ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS	18

TABLE OF CONTENTS—Continued

	Page
III. EXPRESSIONS OF OPINION CONCERNING PUBLIC FIGURES AND EVENTS ARE PROTECTED UNDER THE FIRST AMENDMENT	20
IV. THE NEWS-HERALD COLUMN WAS AN EXPRESSION OF OPINION FULLY PROTECTED UNDER THE FIRST AMENDMENT	25
A. The Views Expressed Were Unmistakably Those of the Author	25
B. The Column Did Not Imply the Existence of Undisclosed Defamatory Facts	28
1. The OHSSA Hearing	29
2. The Court Hearing	31
C. In Their Intrinsic and Extrinsic Contexts, the Challenged Statements Would Clearly Be Understood as Expressions of Opinion	32
V. THE DISTINCTION BETWEEN ACTIONABLE FACT AND CONSTITUTIONALLY PROTECTED OPINION SHOULD REFLECT THE CORE VALUES OF THE FIRST AMENDMENT	36
A. Verifiability	37
B. The Second Restatement Approach	41
C. The Totality of Circumstances	44
CONCLUSION	49

TABLE OF AUTHORITIES

CASES

	Page
Aldoupolis v. Globe Newspaper Co., 398 Mass. 731, 500 N.E.2d 794 (1986)	22
Ambach v. Norwick, 441 U.S. 68 (1979)	14
Avins v. White, 627 F.2d 637 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980)	21
Baker v. Lafayette College, 516 Pa. 291, 532 A.2d 399 (1987)	22
Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 228 Cal. Rptr. 206, 721 P.2d 87 (1986), *cert. denied*, 479 U.S. 1032 (1987)	21
Basarich v. Rodeghero, 24 Ill. App. 3d 889, 321 N.E.2d 739 (1974)	14
Bernal v. Fainter, 467 U.S. 216 (1984)	14
Biggs v. Village of Dupo, 892 F.2d 1298 (7th Cir. 1990)	21
Bland v. Verser, 299 Ark. 490, 774 S.W.2d 124 (1989)	21
Board of License Comm'rs v. *Pastore*, 469 U.S. 238 (1985)	17
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)	24, 25
Bucher v. Roberts, 198 Colo. 1, 595 P.2d 239 (1979)	22
Burns v. McGraw-Hill Broadcasting Co. Inc., 659 P.2d 1351 (Colo. 1983)	22
Bussie v. Lowenthal, 535 So. 2d 378 (La. 1988)	22
Caron v. Bangor Pub. Co., 470 A.2d 782 (Me. 1984)	22
Carroll v. Times Printing Co., slip op., No. 596, n.1 (Tenn. App. May 5, 1987) (1987 W.L. 10332)	22
Casso v. Brand, 776 S.W.2d 551 (Tex. 1989)	22
Church of Scientology v. Cazares, 638 F.2d 1272 (5th Cir. 1981)	21
Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980)	34, 38
Cichos v. Indiana, 385 U.S. 76 (1966)	18, 20
Colorado v. Nunez, 465 U.S. 324 (1984)	20
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	12, 16

TABLE OF AUTHORITIES—Continued

	Page
Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 516 A.2d 220 (1986)	22
Deakins v. Monaghan, 484 U.S. 193 (1988)	17
Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972)	17
Edelman v. California, 344 U.S. 357 (1953)	20
Edwards v. National Audubon Society, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977)	38
EEOC v. Federal Labor Relations Authority, 476 U.S. 19 (1986)	15
Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930)	17
Florida v. Casal, 462 U.S. 637 (1983)	20
Frigon v. Morrison-Maierle, 233 Mont. 113, 760 P.2d 57 (1988)	22
Fudge v. Penthouse Internat'l, Ltd., 840 F.2d 1012 (1st Cir. 1988)	21
Gernander v. Winona State Univ., 428 N.W.2d 473 (Minn. App. 1988)	22
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	*passim*
Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 448 A.2d 1317 (1982)	22
Grayson v. Curtis Pub. Co., 72 Wash. 2d 999, 436 P.2d 756 (1967)	14
Greenbelt Cooperative Publishing Association, Inc. v. Bresler, 398 U.S. 6 (1970)	34, 35
Hall v. Beals, 396 U.S. 45 (1969)	17
Havalunch, Inc. v. Mazza, 294 S.E.2d 70 (W. Va. 1981)	22
Healey v. New England Newspapers, Inc., 520 A.2d 147 (R.I. 1987)	22
Hearst Corp. v. Hughes, 297 Md. 112, 466 A.2d 486 (1983)	22
Henry v. Halliburton, 690 S.W.2d 775 (Mo. 1985)	22
Herb v. Pitcairn, 324 U.S. 117 (1945)	19
Hodges v. United States, 368 U.S. 139 (1961)	18
Hoffman v. Washington Post Co., 433 F. Supp. 600 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978)	14

TABLE OF AUTHORITIES—Continued

	Page
Hotchner v. Castillo-Puche, 551 F.2d 900 (2d Cir. 1977)	46
Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)	21, 24, 48
Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980)	45
Jamerson v. Anderson Newspapers, Inc., 469 N.E.2d 1243 (Ind. App. 1984)	22
Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986)	*passim*
Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1965)	20
Johnson v. Delta-Democrat Pub. Co., 531 So. 2d 811 (Miss. 1988)	22
Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978)	14
Jones v. Board of Educ., 397 U.S. 31 (1970)	18
Jones v. Palmer Communications, Inc., 440 N.W.2d 884 (Iowa 1989)	22
Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d 251 (1975), *cert. denied*, 426 U.S. 907 (1976)	14
Keller v. Miami Herald Pub. Co., 778 F.2d 711 (11th Cir. 1985)	21
Koch v. Goldway, 817 F.2d 507 (9th Cir. 1987)	21, 44
Lauderback v. American Broadcasting Companies, 741 F.2d 193 (8th Cir. 1984)	44
Lewis v. Time Inc., 710 F.2d 549 (9th Cir. 1983)	21, 23, 42
Lorain Journal Co. v. Milkovich, 449 U.S. 966 (1980)	7
Lorain Journal Co. v. Milkovich, 474 U.S. 953 (1985)	8, 12, 13, 14
MacConnell v. Mitten, 131 Ariz. 22, 638 P.2d 689 (1981)	21
Mahoney v. Adirondack Pub. Co., 71 N.Y.2d 31, 523 N.Y.S.2d 480, 517 N.E.2d 1365 (1987)	14
Mashburn v. Collin, 355 So. 2d 879 (La. 1977)	25
McCarthy v. Bruner, 323 U.S. 673 (1944)	18
Michigan v. Long, 463 U.S. 1032 (1983)	19
Milkovich v. Lorain Journal Co., 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979)	7

TABLE OF AUTHORITIES—Continued

	Page
Milkovich v. News Herald, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984)	8, 11, 12
Milkovich v. News Herald, 43 Ohio St. 3d 707, 540 N.E.2d 724 (1989)	10, 15
Milkovich v. News-Herald, 46 Ohio App. 3d 20, 545 N.E.2d 1320 (1989)	9, 15, 16, 19
Miskovsky v. Oklahoma Pub. Co., 654 P.2d 587 (Okla.), *cert. denied*, 459 U.S. 923 (1982)	22
Mittelman v. Witous, slip op., No. 67530 (Ill., Dec. 31, 1989) WL 154272	22
Moffat v. Brown, 751 P.2d 939 (Alaska 1988)	21
Mr. Chow of New York v. Ste. Jour Azur., S.A., 759 F.2d 219 (2d Cir. 1985)	21, 37, 38
Nash v. Keene Pub. Corp., 127 N.H. 214, 498 A.2d 348 (1985)	22
Nevada Independent Broadcasting Corp. v. Allen, 99 Nev. 404, 664 P.2d 337 (1983)	22
New York Times v. Sullivan, 376 U.S. 254 (1964)	20, 24, 48
New York v. Uplinger, 467 U.S. 246 (1984)	18
Nolan v. Nolan, 11 Ohio St. 3d 1, 462 N.E.2d 410 (1984)	9
Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974)	34, 45
Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985)	*passim*
Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979)	21
Paschall v. Christie-Stewart, Inc., 414 U.S. 100 (1973)	17
Pearson v. Fairbanks Pub. Co., 413 P.2d 711 (Alaska 1966)	23, 41
Pease v. Telegraph Pub. Co., 121 N.H. 62, 426 A.2d 463 (1981)	22
Peerless Elec. Co. v. Bowers, 164 Ohio St. 209, 129 N.E.2d 467 (1955)	11
Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986)	15, 23, 46
Potomac Valve & Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Renwick v. News And Observer Pub. Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983), *reversed on other grounds*, 310 N.C. 312, 312 S.E.2d 405 (1984), *cert. denied*, 469 U.S. 858 (1984)	22
Riley v. Moyed, 529 A.2d 248 (Del. 1987)	22
Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983)	21
Rosenblatt v. Baer, 383 U.S. 75 (1966)	13, 14
Saenz v. Morris, 106 N.M. 530, 749 P.2d 159 (1987)	22
Scandinavian World Cruises (Bahamas) Ltd. v. Ergle, 525 So. 2d 1012 (Fla. App. 1988)	22
Scott v. News Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986)	*passim*
Sewell v. Brookbank, 119 Ariz. 422, 581 P.2d 267 (1978)	14
Smith v. Butler, 366 U.S. 161 (1961)	18
State ex rel. Bosch v. Industrial Comm'n, 1 Ohio St. 3d 94, 438 N.E.2d 415 (1982)	11
Steinhilber v. Alphonse, 68 N.Y.2d 283, 508 N.Y.S. 2d 901, 501 N.E.2d 550 (1986)	22
Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988)	*passim*
True v. Ladner, 513 A.2d 257 (Me. 1986)	22
Turner v. Welliver, 226 Neb. 275, 411 N.W.2d 298 (1987)	22
Tyrrell v. District of Columbia, 243 U.S. 1 (1917)	15
Vandenburg v. Newsweek, Inc., 507 F.2d 1024 (5th Cir. 1975)	14
Wilson v. Loew's, Inc., 355 U.S. 597 (1958)	20
Yancy v. Hamilton, slip op., No. 88-SC-693-DG (Ky. 1989)	22
Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977)	20
CONSTITUTIONAL PROVISIONS	
Ohio Const. art. I, § 11	1, 10, 18, 19
U.S. Const. amend. I	1
U.S. Const. art. III, § 2	1, 17
OTHER AUTHORITIES	
Restatement (Second) of Torts § 566 (1977)	*passim*

BRIEF OF RESPONDENTS

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

U.S. Const. art. III, § 2

> The judicial Power shall extend in all Cases, in Law and Equity, arising under this Constitution . . .

Ohio Const. art. I, § 11

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

STATEMENT OF THE CASE

A. The Facts

The Petitioner, Michael Milkovich, Sr., was a public school teacher and head wrestling coach at Maple Heights High School, in Maple Heights, Ohio, from 1950 to 1977. (J.A. 193) During Milkovich's tenure as wrestling coach he compiled a record of 265 wins and 25 losses. (J.A. 211) He won 10 state titles, finished second in the State of Ohio nine times, and placed third in the state twice. (J.A. 199) He was responsible for coaching 480 champions and coached the world championship team against the U.S.S.R. (J.A. 203)

By his own admission, Milkovich actively sought to establish himself as one of America's outstanding coaches and a nationally acclaimed sports figure. Seeking national prominence as an educator and motivator of youth,

he advertised his family as the "Nation's Outstanding Wrestling Family" (J.A. 277, 279, 281) and promoted himself as "Ohio's Number One High School Coach." (J.A. 211, 281) As a result of his public relations activities and the magnitude of his accomplishments, Milkovich was honored by civic groups, legislative bodies, and sports organizations. At trial and during the proceedings below, Milkovich and others summarized his extensive accomplishments and widespread notoriety as follows:

1. Received National Coach of the Year Award, Portland, Oregon, the number one wrestling coach in the United States (J.A. 219)
2. Honored by the Maple Heights School System in May, 1983 by naming a middle school the "Milkovich Middle School" (J.A. 272)
3. Received Congressional Record Citation in 1972 (J.A. 200)
4. Received the Distinguished Coaching Services Award presented by the National Council of High School Coaches (J.A. 200)
5. Inducted into the Helms Foundation [National] Amateur Wrestling Hall of Fame (J.A. 218)
6. Received National Federation Award by the Scholastic Wrestling News (J.A. 200)
7. Conducted wrestling clinics throughout the United States sponsored by state associations and coaches organizations (J.A. 213, 215, 216; R. 646, 647)
8. Appeared frequently as speaker at institutions throughout the United States (R. 630, 631, 632)
9. Received United States Wrestling Federation Award (J.A. 200)
10. Honored with a Resolution by the Ohio Senate (J.A. 219)
11. Honored with a Resolution by the Ohio House of Representatives (J.A. 218, 219)
12. Charter member, Ohio High School Hall of Fame (J.A. 218)

13. Honored by the Cleveland City Council (J.A. 219)
14. Honored by City of Maple Heights: "Mike Milkovich Day" (J.A. 200)
15. Past President, Ohio Coaches Association (J.A. 201)
16. Conducted wrestling school at Baldwin-Wallace College, Berea, Ohio (R. 630)
17. No other wrestling coach in the United States achieved a comparable win-loss record (J.A. 211)
18. Received the Kent State University Athletic Hall of Fame Award (J.A. 200)

On January 9, 1975, Milkovich's conduct as a teacher and wrestling coach was criticized in a sports column written by J. Theodore Diadiun and published in the News Herald. (J.A. 15-17) Under the headings "T.D. says" and "Diadiun says," the column commented on Milkovich's conduct during a wrestling meet in which members and supporters of Milkovich's team attacked visiting wrestlers from Mentor High School. (J.A. 155, 156) Also addressed were Milkovich's testimony before the Ohio High School Athletic Association (OHSAA), which "severely censured" Milkovich for failing to control himself and his team during the meet (J.A. 131, 132) and Milkovich's subsequent testimony before a common pleas judge who overturned the OHSAA's orders on due process grounds. Writing for the Mentor community whose wrestlers had been attacked at Maple Heights, sportswriter Diadiun expressed the view that Milkovich had misrepresented the events of the wrestling meet in his testimony before the OHSAA and the court, attempting "incredibly, [to] shift the blame of the affair to Mentor." In the conclusion of his column Diadiun posed and answered the question: Is that the kind of lesson we want our young people learning from their high school administrators and coaches?" (J.A. 15, 16, 17) The events leading up to the News Herald column are as follows:

On February 9, 1974, a wrestling meet was held at Maple Heights High School before an audience of approximately 2000 spectators. (J.A. 159) The visting team was from Mentor High School, a community served by the News Herald. During one of the scheduled matches, a Maple Heights wrestler, who had gone undefeated for the year and was ahead on match points, fouled and apparently injured a Mentor wrestler. (J.A. 151, 152, 255, 226) Milkovich believed that the Mentor wrestler could continue the match (J.A. 224), and when meet officials awarded the match to the injured Mentor wrestler by forfeiture Milkovich became visibly upset. (J.A. 160, 225, 226; R. 226, 401, 434) He began making hand gestures to exemplify his disgust with the forfeiture. (J.A. 155, 158, 225; R. 27, 31, 226, 243, 401, 440) Immediately thereafter (R. 230, 283) two Maple Heights wrestlers left their bench and attacked at least one Mentor wrestler. (J.A. 155, 156) With this, the benches and stands cleared and a melee began. (J.A. 156; R. 103, 231, 283, 436, 437)

Milkovich was in the middle of the melee at all times, either attempting to separate fighting wrestlers or observing the confusion. (J.A. 156, 157; R. 197, 232, 439) Four Mentor wrestlers were taken to the hospital for treatment of injuries suffered. (R. 569) A movie camera was present and captured the violence of the scene.

Diadiun witnessed the meet and the riot as a sports reporter who had followed Milkovich's coaching career since 1967. (J.A. 185) Immediately following the meet, Diadiun wrote a column in the News-Herald describing the incident and criticizing Milkovich and the entire Maple Heights coaching staff; Milkovich made no complaint about this column. (J.A. 161; Milkovich Depo. R. 880) In addition to attending the match, Diadiun read accounts of the affray on the Associated Press wire service and in other newspapers. (Diadiun Depo. R. 1028) He also interviewed numerous other spectators regarding their impressions of the incident. (J.A. 141-143)

On February 28, 1974, the Ohio High School Athletic Association conducted an investigation into the conduct of Milkovich and his team at the wrestling meet. Diadiun attended the administrative hearing (J.A. 164) and listened to Milkovich's testimony, as well as the testimony of H. Don Scott, the Maple Heights superintendent of schools. Based upon his first-hand observations at the hearing, Diadiun believed that the Maple Heights representatives presented a different picture of what had occurred at the wrestling meet than what he himself had observed. (J.A. 167) In fact, Diadiun believed that Milkovich told several specific lies at the OHSAA hearing. (J.A. 180)

After the February 28, 1974 hearing the OHSAA issued a "severe censure" to Milkovich and his son, the junior varsity coach, and placed the Maple Heights wrestling team on probation from March 1, 1974 until the end of the 1975-76 school year, declaring the team ineligible for the 1975 state wrestling tournament. In addition, the OHSAA ordered the principal of Maple Heights High School to re-evaluate the entire wrestling program to ensure the safety of participants and spectators at all wrestling meets. (J.A. 131, 132) On March 5, 1974 the Ohio Athletic Commission issued the following written censure to Milkovich:

> From the reports studied by the State Board they were of the unanimous opinion that you were derelict in your responsibility to insure that members of your wrestling team conducted themselves the way high school athletes are expected to. There was a distinct feeling that if you had taken proper precautions your team would have not become involved with the Mentor High wrestlers. Coaches have a great responsibility in crowd control and it all begins with, first of all, controlling yourself and members of your team and if this is done in a proper manner crowd control then becomes a very minor problem.

(J.A. 130)

The OHSAA mailed thousands of copies of its censure resolution throughout Ohio—to schools, newspapers, and television stations. (J.A. 234, 235, 236, 238, 287) The South East Sun (J.A. 287) and the Cleveland Plain Dealer (R. 690) gave substantial publicity to Milkovich's censure.

Milkovich did not appeal the OHSAA censure. (J.A. 234) However, several wrestlers and their parents subsequently filed suit in the Common Pleas Court of Franklin County, Ohio, challenging the OHSAA's suspension of the Maple Heights team. Milkovich was not a party-litigant (J.A. 170), but he appeared voluntarily and gave testimony. (R. 93, 95) Though several photographs from the wrestling meet depict him watching the melee (R. 804-808), Milkovich testified at the court hearing that he saw no fighting or unruliness on the part of any Maple Heights wrestler. (R. 94)

Sportswriter Diadiun did not attend the court hearing. (J.A. 170, 171, 173) Four or five days after the hearing, however, he had a number of conversations with Dr. Harold Meyer, the Commissioner of the OHSAA, who had attended the hearing. (J.A. 172, 173) Dr. Meyer was angry and upset during his conversations with Diadiun; he felt that he had been blamed at the court hearing for being negligent. (J.A. 172, 265) Although, during the trial of the instant case, Dr. Meyer's recollection of his conversations with Diadiun was hazy (J.A. 267), Diadiun remembered the conversations clearly. Dr. Meyer told Diadiun, "I can tell you this: some of the stories told to the judge sounded pretty darned unfamiliar." (J.A. 172) Dr. Meyer also told Diadiun, "I don't know what we're supposed to do in this judicial system. Just tell your side and the hell with the truth." (J.A. 180)

Diadiun had heard Milkovich tell what Diadiun believed to be several lies at the OHSAA hearing (J.A. 180), and he interpreted Dr. Meyer's agitated remarks to mean that Milkovich had again misrepresented what actually happened at the riot in order to put the Maple Heights wrestlers in a favorable light before the judge. (J.A. 177)

On January 8, 1975—the day after the common pleas court issued its decision overturning the OHSAA orders on due process grounds—the column at issue appeared in the News Herald. Owned by the Lorain Journal Company, the News Herald is a local newspaper with a circulation of about 27,000. (J.A. 188) Diadiun's column appeared in the sports section, on pages 35 and 39 of the paper. (J.A. 15, 16, 17) The column is reproduced in its entirety in Milkovich's brief.

The trial of Milkovich's lawsuit began on April 10, 1978. Milkovich's counsel presented evidence for five days. At no time did any witness interpret the News Herald column as an accusation of perjury. Diadiun testified that he based his column on the knowledge he had gained from attending the February 9, 1974 wrestling meet and the February 28, 1974 OHSAA hearing, as well as his conversations with Dr. Harold Meyer about the court hearing. (J.A. 175) He expressly denied that the column accused Milkovich of perjury. (J.A. 180)

B. The Proceedings Below

Milkovich filed this action on April 30, 1975 in the Court of Common Pleas of Lake County, Ohio. After five days of trial, and at the close of Milkovich's case-in-chief, the trial court ruled that Milkovich was a public figure and granted Respondents' motion for a directed verdict on the ground that Milkovich had failed to prove actual malice. (J.A. 21-22) The Court of Appeals, Eleventh Judicial District, reversed and remanded for further proceedings. *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N.E.2d 662 (1979). The Supreme Court of Ohio dismissed Respondents' appeal. (J.A. 38) This Court denied Respondents' petition for certiorari over Justice Brennan's dissent. *Lorain Journal Co. v. Milkovich*, 449 U.S. 966 (1980).

On remand, the trial court granted Respondents' motion for summary judgment, holding that (1) Milkovich was a public figure as a matter of law; (2) Milkovich failed to produce sufficient evidence to raise a genuine issue of material fact with regard to actual malice; and (3) the column was constitutionally protected opinion. (J.A. 47-59) This time the court of appeals affirmed. (J.A. 62-70) The Supreme Court of Ohio reversed, holding that (1) Milkovich was not a public figure and (2) the column was not protected opinion; the court made no determination about, and did not discuss, the sufficiency of the evidence to establish actual malice. *Milkovich v. News Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984), *overruled in Scott v. News Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986). Once again, this Court denied Respondents' petition for certiorari over the dissent of Justice Brennan (joined by Justice Marshall), who stated that Milkovich was both a public official and a public figure under established precedent of this Court. *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 957-64 (1985) (Brennan, J., dissenting from the denial of certiorari). Justice Brennan also noted that both the trial court and the court of appeals had found insufficient evidence for a jury to conclude that the column was published with actual malice. *Id.* at 957.

On the second remand, the trial court stayed the proceedings pending the ruling of the Ohio Supreme Court in a related case involving the same column, *Scott v. News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986).

The *Scott* court expressly overruled its earlier *Milkovich* decision as follows: (1) it concluded that the column at issue in both the *Scott* case and the instant case was constitutionally protected as opinion, and (2) it concluded that both Scott and Milkovich were public figures. Quoting Justice Brennan's dissent from this Court's denial of certiorari in *Milkovich*, the *Scott* court endorsed the point "correctly adduced" by Justice Brennan that "[t]o say that Milkovich . . . was not a public figure . . .

is simply nonsense," a point found "*equally applicable* to H. Don Scott in his capacity as superintendent." *Id.* at 247-48, 496 N.E.2d at 704 (emphasis added). The *Scott* court expressly overruled the prior *Milkovich* decision "in its restrictive view of public officials." *Id.* The court also stated that "[t]he record herein . . . supports the determination of the trial court that actual malice could not be established." *Id.* at 249, 496 N.E.2d at 705. Scott's subsequent petition to this Court for review was rejected as untimely.

Following the ruling in *Scott*, Respondents moved for summary judgment in Milkovich's case on the ground that *Scott* should control the outcome with regard to Milkovich's status as a public figure and public official, the absence of evidence sufficient to establish actual malice or negligence, and the nature of the column as constitutionally protected opinion. Summary judgment was granted and Milkovich appealed. *Milkovich v. News-Herald*, 46 Ohio App. 3d 20, 545 N.E.2d 1320 (1989). Milkovich listed four assignments of error: (1) that the trial court erred in holding that the column was protected opinion, (2) that the earlier Ohio Supreme Court decision in *Milkovich* should be the law of the case, not the intervening *Scott* decision, (3) that the constitutional protection of the News Herald column as opinion depended on the resolution of disputed factual contentions and could not be resolved on summary judgment, and (4) that "there is a genuine issue of fact in dispute as to negligence and actual malice." *Id.* at 22, 545 N.E.2d at 1323. The court of appeals affirmed the grant of summary judgment and held all four assignments of error to be "without merit." *Id.* at 24, 545 N.E.2d at 1325. The court of appeals also held that the *Scott* decision controlled the outcome of Milkovich's case under an exception to the law of the case doctrine enunciated by the Ohio Supreme Court in *Nolan v. Nolan*, 11 Ohio St. 3d 1, 462 N.E.2d 410 (1984). *Id.*

In his appeal to the Ohio Supreme Court, Milkovich appealed only the appellate court's determination that

the column was constitutionally protected opinion. The Ohio Supreme Court dismissed the appeal. *Milkovich v. News Herald*, 43 Ohio St. 3d 707, 540 N.E.2d 724 (1989).

SUMMARY OF ARGUMENT

1. Petitioner Michael Milkovich, Sr., a nationally renowned wrestling coach and public school teacher, was held by the lower courts to be a public figure and a public official. The lower courts also found that Milkovich had offered insufficient evidence to establish that the News Herald column was published with actual malice or negligence. Milkovich did not raise these issues in the Ohio Supreme Court and has not presented them to this Court for review; he has challenged only the lower courts' determination that the News Herald column was constitutionally protected opinion. Because any ruling on the sole issue presented by Milkovich for review would have no impact on the underlying judgment but would be merely advisory, the Court should dismiss the writ of certiorari as improvidently granted.

2. The Ohio Supreme Court's holding that the News Herald column was protected opinion was based primarily upon Article I, section 11 of the Ohio constitution—a basis expressly stated to be independent of federal law. Because the decision below was based on an adequate and independent state law ground, this Court should dismiss the writ of certiorari as improvidently granted.

3. The News Herald column was an emotionally charged commentary by sportswriter Diadiun concerning Milkovich's conduct, as an educator and coach, in events surrounding a riot at a high school wrestling meet—an incident that had resulted in a "severe censure" of Milkovich by the Ohio High School Athletic Association for failing to control himself and his team. In light of the heading of the column ("Diadiun says"), the frequent use of words of apparency, and the moral judgments that were the central theme, the column would certainly be viewed by its readers to convey the subjective opinion

of its author on a matter of public controversy. For these reasons, and the fact that the column does not imply the existence of undisclosed defamatory facts, the column was constitutionally protected under the First Amendment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

ARGUMENT

I. THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED BECAUSE ANY RULING ON THE SOLE ISSUE PRESENTED BY MILKOVICH FOR REVIEW WOULD BE ADVISORY.

A. The Lower Courts Held that Milkovich, a Nationally Acclaimed Wrestling Coach and Public School Teacher, Is Both a Public Figure and a Public Official—a Ruling Milkovich Has Not Challenged.

Petitioner cites *Milkovich v. News Herald* for the proposition that he is neither a public official nor public figure, *see* Brief of Petitioner at 18 n.6, but he fails to note that *Milkovich* was expressly overruled "in its restrictive view of public officials." *Scott v. News Herald*, 25 Ohio St. 3d 243, 245-48, 496 N.E.2d 700, 702-04 (1986) (overruling *Milkovich v. News Herald*, 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984)).[1] Observing that "both Milkovich and Scott were authority figures—individuals with substantial impact on their community," the *Scott* court endorsed the point "correctly adduced" by Justice Brennan that "[t]o say that Milkovich . . . was not a public figure for purposes of discussion about the controversy is simply nonsense." *Scott*, 25 Ohio St. 3d at 247, 496 N.E.2d at 703 (quoting Justice Brennan's dis-

[1] Milkovich's assertion that the overruled *Milkovich* decision remains authoritative is contrary to Ohio law. As the Ohio Supreme Court has held, "a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it *never was the law*." *Peerless Elec. Co. v. Bowers*, 164 Ohio St. 209, 210, 129 N.E.2d 467, 468 (1955), *cited with approval in State ex rel. Bosch v. Industrial Comm'n*, 1 Ohio St. 3d 94, 438 N.E.2d 415 (1982).

sent from the denial of certiorari in *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 964 (1985)).

The *Scott* court's reversal of *Milkovich* and its clarification of Milkovich's public figure status were entirely consistent with this Court's decision in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967). Like the former coach and athletic director in *Butts* who had attained public figure status by reason of his "position alone," Milkovich's outstanding achievements and successful self-promotional efforts had earned him widespread notoriety as one of the nation's preeminent wrestling coaches. 388 U.S. 130, 154-55 (1967). Indeed, Milkovich was selected to coach the United States team against the Soviet Union.[2] (J.A. 203)

Even closer parallels can be drawn to the plaintiff in *Walker*, a retired military officer who became a limited purpose public figure by his involvement in a public controversy. *Associated Press v. Walker*, decided with *Butts*, 388 U.S. 130 (1967). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) ("in some instances

[2] Coach Milkovich was at least as "well-known and respected in coaching ranks" as was Athletic Director Butts. Milkovich sought and attained a national prominence and respect within the athletic world that was unparalleled in high school coaching (J.A. 211). He coached the world championship team against the U.S.S.R. (J.A. 203); was inducted into the National Helms Hall of Fame (J.A. 218); was given the National Coach of the Year Award for 1977 in Portland, Oregon (J.A. 219); received the United States Wrestling Federation Award (J.A. 200); was the President of the Ohio Coaches Association (J.A. 201); received the National Council of High School Coaches Award (J.A. 200, 201); and was given the National Achievement Award by the Scholastic Wrestling News (J.A. 200). *See Milkovich v. News Herald*, 15 Ohio St. 3d 292, 296 n.1, 473 N.E.2d 1191 (1984). Milkovich's prominence in coaching also created a national recognition and respect outside of athletics. He was honored by the Ohio Senate, the Ohio House of Representatives and the City of Cleveland, Ohio (J.A. 218, 219); received citations in the Congressional Record (J.A. 200), and was recognized with a "Mike Milkovich Day" by the City of Maple Heights, Ohio (J.A. 200).

an individual may achieve such fame or notoriety that he becomes a public figure for all purposes and in all contexts," while "[m]ore commonly, an individual injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues"). Like Walker, Milkovich was inextricably drawn into an important public controversy by allegations that he had encouraged a riot. In both cases the publication complained of was inspired by a brawl at a school that resulted in injuries to a number of students, and the subject of the publication was in the middle of the affray. (J.A. 156)

Indeed, Milkovich's case is even more compelling than that of Walker; unlike Walker, Milkovich had actually been censured by a governing body for failing to control his own conduct during the wrestling meet—an unappealed ruling that lay at the heart of sportswriter Diadiun's criticisms. As Justice Brennan wrote in his dissent from the denial of certiorari in *Milkovich*, "[t]he conclusion that Milkovich was a limited purpose public figure therefore seems quite straightforward." 474 U.S. at 963.

The investigations and hearings resulting from the unprovoked attack on Mentor High School's wrestlers were unquestionably of significant concern to the local community, and it was primarily in that community that the News Herald column was circulated. (J.A. 188) As this Court held in *Rosenblatt v. Baer*, "[t]he subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant." 383 U.S. 75, 83 (1966). This point was echoed by the *Scott* court in its comment that "[b]ecause the newspaper in which the alleged libelous statements were contained is of a local circulation, a finding of public official status is particularly strengthened."[3] 25 Ohio St. 3d at 246, 496 N.E.2d at 702 (1986).

[3] The *Scott* court also implicitly recognized Milkovich to be a public *official* by virtue of his position as a public school teacher and

The *Scott* court was clearly correct in finding Milkovich to be a public figure. Indeed, Milkovich has not even challenged that finding in his appeal to this Court or in his appeal to the Ohio Supreme Court below.

B. The Lower Courts Ruled that Milkovich Had Failed to Prove Either Actual Malice or Negligence, and Milkovich Has Not Challenged Such Rulings.

Presenting only the federal "opinion" issue to this Court, Milkovich has also ignored the lower courts' hold-

---

coach. As this Court held in *Rosenblatt*, a public official is one who holds a position in government of "such apparent import that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees." 383 U.S. at 86. Justice Brennan concluded that "the status of a public school teacher as a 'public official' . . . follows *a fortiori* from the reasoning of the Court in *Rosenblatt*." *Lorain Journal Co. v. Milkovich*, 474 U.S. at 958 (Brennan, J., dissenting from denial of certiorari). Noting this Court's decision in *Ambach v. Norwick*, 411 U.S. 68, 75-76, 78 (1979), that "public school teachers may be regarded as performing a task 'that go[es] to the heart of representative government' [and] 'a teacher serves as a role model for his students,'" Justice Brennan stated:

> Diadiun's column challenged Milkovich's qualifications to teach young students in light of his conduct in connection with the Maple Heights/Mentor High School incident. It is precisely this type of discussion that *New York Times* and its progeny seek to protect.

474 U.S. at 960. *See also Bernal v. Fainter*, 467 U.S. 216, 220 (1984) ("teachers . . . possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation"). Lower courts have consistently held teachers and coaches to be public officials or public figures in defamation actions. *See Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir. 1988); *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024 (5th Cir. 1975); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (D.C. Cir. 1978); *Mahoney v. Adirondack Pub. Co.*, 71 N.Y.2d 31, 523 N.Y.S.2d 480, 517 N.E.2d 1365 (1987); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla. 1978); *Sewell v. Brookbank*, 119 Ariz. 422, 581 P.2d 267 (1978); *Grayson v. Curtis Pub. Co.*, 72 Wash. 2d 999, 436 P.2d 756 (1967); *Kapiloff v. Dunn*, 27 Md. App. 514, 343 A.2d 251 (1975), *cert. denied*, 426 U.S. 907 (1976); *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 321 N.E.2d 739 (1974).

ing that he had failed to raise a genuine issue of material fact on whether Diadiun's column was published with actual malice *or* negligence. Milkovich's most recent appeal to the court of appeals asserted as a "fourth assignment of error" that "there is a genuine issue of fact in dispute as to negligence and actual malice." *Milkovich v. News Herald*, 46 Ohio App. 3d 20, 22, 545 N.E.2d 1320, 1323. Finding the fourth assignment of error to be "without merit," the court of appeals expressly held that "[a]s a matter of law, the instant cause does not present any material issue of fact as to negligence or 'actual malice.'"[4] 46 Ohio App. 3d at 24, 545 N.E.2d at 1325. Because the Ohio Supreme Court dismissed Milkovich's appeal, *Milkovich v. News Herald*, 43 Ohio St. 3d 707, 540 N.E.2d 724 (1989), the court of appeals' holding stands unreversed (and unchallenged).[5]

The lower courts were clearly correct in finding that Milkovich had failed to establish actual malice or negligence. 46 Ohio App. 3d at 22, 545 N.E.2d at 1323. Diadiun was present at the wrestling meet on February

---

[4] The court of appeals' holding was consistent with earlier decisions in Milkovich's case; every time they have considered the issue, Ohio courts have found Milkovich's evidence insufficient to establish actual malice. (R. 771 (trial court, 1978); J.A. 58-59 (trial court, 1981)); J.A. 65-66 (court of appeals, 1983). *See Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 705. In fact, the trial court in its initial ruling—granting a directed verdict after five days of trial—was unconvinced that the column was false (R. 771); despite photographs depicting him watching the attack (R. 804-808), Milkovich had testified in the 1974 court hearing discussed in Diadiun's column that he saw no fighting or unruliness on the part of any Maple Heights wrestler (R. 94). Thus, Milkovich cannot even establish the falsity of the alleged libel. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

[5] In fact, Milkovich appealed only the "opinion" issue to the Ohio Supreme Court and thus has *failed to preserve* for review by this Court the other determinations by the court of appeals that Milkovich is a public figure who has failed to prove actual malice or negligence. *See, e.g., EEOC v. Federal Labor Relations Authority*, 476 U.S. 19 (1986); *Tyrrell v. District of Columbia*, 243 U.S. 1 (1917).

9, 1974. (J.A. 185). Diadiun also attended and testified at the OHSAA hearing (J.A. 164) where he heard Milkovich tell what Diadiun believed to be several lies. (J.A. 180) After the November 8, 1974 court hearing Diadiun spoke with Dr. Harold Meyer, the OHSAA commissioner, who described the testimony Milkovich and Scott had offered to the court. Upset by what he perceived to be an attempt to cast blame on to him, Dr. Meyer told Diadiun: "I can say that some of the stories told to the judge sounded pretty darned unfamiliar. It certainly sounded different from what they told us [the OHSAA]." (J.A. 171, 172, 178) Thus, Diadiun's comments in the News Herald column were supported by his own observations during the wrestling meet and at the OHSAA hearing, as well as by his conversations with Dr. Meyer, a most credible source. (J.A. 175)

There is no evidence that Diadiun entertained any doubt about the truth of the column at the time of its publication. His comments were based on personal observations and other reliable information, all of which he believed to be true. (J.A. 141)

C. Any Ruling on the Federal "Opinion" Issue Would Be Advisory.

Because Milkovich has been held to be a public figure who has failed to prove actual malice, he is prevented from recovering against Respondents on grounds completely independent of the "opinion" issue he presented to the Ohio Supreme Court and to this Court for review. *See, e.g., Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1966); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974) (the First Amendment requires a public figure plaintiff to prove actual malice in order to impose liability in a defamation action).

Even if he were merely a private figure, Milkovich's suit would still be precluded by the court of appeals' ruling that he has produced insufficient evidence to establish *negligence*. *See Milkovich v. News Herald*, 46 Ohio App. 3d at 22, 24, 545 N.E.2d at 1323, 1325. *See* 418 U.S. at

347 (the First Amendment prevents states from imposing liability without fault in defamation cases, even if the plaintiff is neither a public figure nor a public official). Milkovich's inability to prove negligence is a second independent basis for the decisions below—a basis he has not challenged either in this Court or in the Ohio Supreme Court.

This Court has long recognized that it has no jurisdiction to issue "advisory opinions," no matter how compelling the issue of law. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) ("Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants."); *Federal Radio Comm'n v. General Elec. Co.*, 281 U.S. 464, 469 (1930) (Article III does not vest the Court with jurisdiction to "give decisions which are merely advisory")." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (the Court must " 'avoid advisory opinions on abstract propositions of law' " (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969)).

An opinion is "advisory" if, among other things, the Court's decision on the issue will not affect the disposition of the case by the courts below. *See, e.g., Board of License Comm'rs v. Pastore*, 469 U.S. 238, 239-40 (1985) (dismissing the writ of certiorari because "no decision on the merits can have an effect" on the underlying judgment); *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 101 (1973) (after the Court heard oral argument and reviewed the record, it discovered an unchallenged and independent ground for the appealed judgment and stated that any decision it might render on the appealed issue would be "advisory and beyond our jurisdiction").

This Court's decision on the sole issue presented by Milkovich for its review would have no impact on the underlying judgment. Even if the Court were to decide that the News Herald column is not protected as opinion, Milkovich's suit would still be precluded by the Ohio courts' unchallenged finding that neither actual malice nor negligence was shown. Thus, any consideration of

the "opinion" issue would offend the jurisdictional prohibition on the rendering of advisory rulings, and the writ of certiorari should be dismissed.[6]

Because Milkovich has not sought review of the lower court holdings on the independent, alternative, and ultimately dispositive issues, Respondents submit that it is unnecessary for this Court to reach those issues. Should this Court conclude that such holdings are not dispositive, however, Respondents would urge the Court to affirm the correctness of the alternative holdings to the extent necessary to ensure that Respondents' First Amendment rights will continue to be protected.

II. THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED BECAUSE THE OHIO SUPREME COURT EXPRESSLY BASED ITS CONCLUSION THAT THE COLUMN IS PROTECTED OPINION ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS.

In holding the News Herald column to be constitutionally protected opinion, the *Scott* court relied not only on the United States Constitution but also on Article I, section 11 of the Ohio Constitution. In fact, the *Scott* court's primary holding was based *solely* on the state constitutional ground:

> In *Milkovich v. News-Herald*, . . . this court recently dealt with the same article we examine today. For reasons to be expressed herein, we now overrule the holding in *Milkovich* with respect to the characterization of the article. We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution as a proper exercise of freedom of the press.

[6] This Court has not hesitated to dismiss writs of certiorari when it appears on review of the merits that certiorari was improvidently granted. *See, e.g., Jones v. Board of Educ.*, 397 U.S. 31 (1970); *McCarthy v. Bruner*, 323 U.S. 673 (1944). *See also New York v. Uplinger*, 467 U.S. 246, 248 (1984); *Cichos v. Indiana*, 385 U.S. 76 (1966); *Hodges v. United States*, 368 U.S. 139 (1961); *Smith v. Butler*, 366 U.S. 161 (1961).

Scott, 25 Ohio St. 3d at 244, 496 N.E.2d at 701. That the state constitutional basis was *intended* to be independent of federal law was expressly stated:

> These ideals are not only an integral part of First Amendment freedoms under the Federal Constitution *but are independently reinforced in Section 11, Article I of the Ohio Constitution* . . . .

Scott, 25 Ohio St. 3d at 245, 496 N.E. 2d at 702 (emphasis added). When, in the aftermath of *Scott*, the opinion content of the News Herald column was revisited in Milkovich's case, the court of appeals correctly held that the *Scott* decision—overruling the prior *Milkovich* holding on the opinion issue—was the controlling authority. *Milkovich v. News Herald*, 46 Ohio App. 3d at 23, 545 N.E.2d at 1324.

In *Michigan v. Long*, 463 U.S. 1032, 1042 (1983), this Court announced that it has jurisdiction to review a case "in the absence of a plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 1044. When a case does rest on an adequate and independent state law ground, however, a jurisdictional principle precludes review:

> The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of the federal laws, our review could amount to nothing more than an advisory opinion."

Id. at 1042 (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945)). Thus, the impact of *Michigan v. Long* is *not* that this Court has jurisdiction whenever the decision below is based on both federal and state grounds; rather, the Court may review such a case only if the lower court failed to state plainly that its decision was based on an independent state law ground.

As quoted above, the Ohio Supreme Court plainly stated in *Scott* that the constitutional protection of the News Herald column was based not only on the federal constitution, but also "*independently*" on the Ohio Constitution. Inasmuch as the decision below rests on an adequate and

independent state law ground, this Court lacks jurisdiction to decide the instant case and should dismiss the writ.[7]

III. EXPRESSIONS OF OPINION CONCERNING PUBLIC FIGURES AND EVENTS ARE PROTECTED UNDER THE FIRST AMENDMENT.

In *New York Times v. Sullivan*, this Court recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," even though it may include attacks on public officials that are vehement, caustic, and unpleasant. 376 U.S. 254, 269 (1964). This Court further recognized that absent constitutional protection for these forms of speech, the threat of libel suits would result in media self-censorship. *Id.* at 279. Consequently, free expression would be inhibited and the truth necessary for self-government would be impaired.

The constitutional tenets expressed in *New York Times* concerning the need to preserve robust debate about matters of public importance apply to expressions of opinion no less than to assertions of fact. Indeed, the rationale for extending First Amendment protections to expressions of opinion concerning matters of public importance is more compelling than the need for protection of factual assertions. As Judge Wisdom wrote in *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987):

> Ideas and opinions bear the personal imprint of the men and women who hold them. It is therefore particularly important to protect their unfettered ex-

[7] This Court has on several occasions dismissed a writ of certiorari as improvidently granted after determining that the decision below was based on an independent state ground. *See, e.g., Colorado v. Nunez*, 465 U.S. 324 (1984) (decided *after Michigan v. Long*); *Florida v. Casal*, 462 U.S. 637 (1983). *See also Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Cichos v. Indiana*, 385 U.S. 76 (1966); *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965); *Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958); *Edelman v. California*, 344 U.S. 357 (1953).

> pression, and a rule that chills statements of fact may be acceptable where a rule chilling opinions would not.

Id. at 1286. The "free flow of ideas and opinions on matters of public interest and concern" lies at the heart of the First Amendment. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

The constitutional distinction between expressions of opinion and assertions of fact was most clearly identified in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Finding the distinction to be inherent in the First Amendment, Justice Powell wrote:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.

418 U.S. at 339-340. Relying principally on *Gertz*, the courts in every federal circuit[8] and at least 36 states[9]

[8] *Fudge v. Penthouse Intern., Ltd.*, 840 F.2d 1012, 1016 (1st Cir. 1988); *Mr. Chow of New York v. Ste. Jour Azur., S.A.*, 759 F.2d 219, 224 (2d Cir. 1985); *Avins v. White*, 627 F.2d 637, 642 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980); *Potomac Valve*, 829 F.2d at 1285; *Church of Scientology v. Cazares*, 638 F.2d 1272, 1286 (5th Cir. 1981); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); *Biggs v. Village of Dupo*, 892 F.2d 1298 (7th Cir. 1990); *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986); *Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983); *Koch v. Goldway*, 817 F.2d 507, 508 (9th Cir. 1987); *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983); *Keller v. Miami Herald Pub. Co.*, 778 F.2d 711 (11th Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

[9] *Moffat v. Brown*, 751 P.2d 939, 944 (Alaska 1988); *MacConnell v. Mitten*, 131 Ariz. 22, 638 P.2d 689 (1981); *Bland v. Verser*, 299 Ark. 490, 774 S.W.2d 124, 125-26 (1989); *Baker v. Los Angeles*

have held expressions of opinion to be protected under the First Amendment.

Milkovich argues that *Gertz* and its progeny are manifestly wrong—that independent constitutional protection of opinions has never been recognized by this Court and

Herald Examiner, 42 Cal. 3d 254, 228 Cal. Rptr. 206, 721 P.2d 87 (1986), *cert. denied*, 479 U.S. 1032 (1987); *Burns v. McGraw-Hill Broadcasting Co. Inc.*, 659 P.2d 1351, 1358 (Colo. 1983); *Bucher v. Roberts*, 198 Colo. 1, 3-5, 595 P.2d 239, 241-42 (1979); *Goodrich v. Waterbury Republican-American Inc.*, 188 Conn. 107, 448 A.2d 1317, 1324 (1982); *Riley v. Moyed*, 529 A.2d 248 (Del. 1987); *Scandinavian World Cruises (Bahamas) Ltd. v. Ergle*, 525 So. 2d 1012 (Fla. App. 1988); *Mittelman v. Witous*, slip op., No. 67530 (Ill., Dec. 21, 1989) WL 154272; *Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243, 1252 (Ind. App. 1984); *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884 (Iowa 1989); *Yancy v. Hamilton*, slip op., No. 88-SC-693-DG (Ky. 1989); *Bussie v. Lowenthal*, 535 So. 2d 378, 380-81 (La. 1988); *Caron v. Bangor Pub. Co.*, 470 A.2d 782, 784 (Me. 1984); *True v. Ladner*, 513 A.2d 257, 261 (Me. 1986); *Hearst Corp. v. Hughes*, 297 Md. 112, 466 A.2d 486 (1983); *Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 500 N.E.2d 794, 796 (1986); *Germander v. Winona State University*, 428 N.W.2d 473, 475 (Minn. App. 1988); *Johnson v. Delta-Democrat Pub. Co.*, 531 So. 2d 811 (Miss. 1988); *Henry v. Halliburton*, 690 S.W.2d 775 (Mo. 1985) (*en banc*); *Frigon v. Morrison-Maierle*, 233 Mont. 113, 760 P.2d 57 (1988); *Turner v. Wellicer*, 226 Neb. 275, 411 N.W.2d 298, 309-10 (1987); *Nevada Independent Broadcasting Corp. v. Allen*, 99 Nev. 404, 664 P.2d 337 (1983); *Nash v. Keene Pub. Corp.*, 127 N.H. 214, 498 A.2d 348, 351 (1985); *Pease v. Telegraph Pub. Co.*, 121 N.H. 62, 65, 426 A.2d 463, 465 (1981); *Dairy Stores, Inc. v. Sentinel Pub. Co.*, 104 N.J. 125, 516 A.2d 220, 231 (1986); *Saenz v. Morris*, 106 N.M. 530, 746 P.2d 159 (1987); *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 508 N.Y.S.2d 901, 501 N.E.2d 550 (1986); *Renwick v. News And Observer Pub. Co.*, 63 N.C. App. 200, 304 S.E.2d 593, 604 (1983), *reversed on other grounds*, 310 N.C. 312, 312 S.E.2d 405 (1984), *cert. denied*, 469 U.S. 858 (1984); *Scott*, 25 Ohio St. 3d 243, 496 N.E.2d 399 (1986); *Miskovsky v. Oklahoma Pub. Co.*, 654 P.2d 587 (Okla.), *cert. denied*, 459 U.S. 923 (1982); *Baker v. Lafayette College*, 516 Pa. 291, 532 A.2d 399 (1987); *Healey v. New England Newspapers, Inc.*, 520 A.2d 147, 150-51 (R.I. 1987); *Carroll v. Times Printing Co.*, slip op., No. 596, n.1 (Tenn. App. May 5, 1987) (1987 W.L. 10232); *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989); *Hinzlauch, Inc. v. Mazza*, 294 S.E.2d 70, 75 (W. Va. 1981).

is in fact unnecessary in light of the Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Milkovich is wrong on both scores. *Hepps* imposes upon the plaintiff the burden of establishing the falsity of the alleged defamation, a burden that presupposes a determination by the trial court on whether the challenged statement is an assertion of fact or an expression of opinion. Yet *Hepps* alone would afford the trial court little guidance on how that determination is to be made. The difficulty encountered by the lower courts has not been on *whether* to protect opinion, but rather on what basis or criteria an expression of opinion should be distinguished from an assertion of fact. *Hepps* requires the distinction but begs the underlying issue.

Without the careful analyses prompted by *Gertz*, the fact/opinion distinction under *Hepps* would turn solely on whether the challenged statement is "verifiable"—that is, capable of being proven true or false. Yet the circuit courts have found that verifiability, though useful in identifying purely subjective statements of emotion or sentiment, does not adequately resolve the more difficult cases.[10] The Seventh Circuit has cautioned against rigid adherence to *any "test,"* pointing out that "[e]very statement of opinion contains or implies some proposition of fact, just as every statement of fact has or implies an evaluative component." *Stevens v. Tillman*, 855 F.2d 394, 398-99 (7th Cir. 1988). Verifiability, if used as a sole criterion, would not provide clear guidance to judges, much less to the writers and speakers whose statements must be evaluated. *See Pearson v. Fairbanks Pub. Co.*, 413 P.2d 711, 714 (Alaska 1966) ("One should not be deterred from speaking out through the fear that what he gives as his opinion will be construed by a court as

[10] *See, e.g., Potomac Valve*, 829 F.2d at 1288; *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302-04 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986); *Lewis v. Time, Inc.*, 710 F.2d 549, 553-55 (9th Cir. 1983); *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985). *See also* notes 17 through 19 *infra* and accompanying text.

inferring, if not actually amounting to, a misstatement of fact."). *See also New York Times*, 376 U.S. at 278-79 (finding the truth defense to be inadequate to protect constitutional rights because uncertainties in application and result would promote self-censorship).

More importantly, the traditional determinant of verifiability—whether the challenged statement can be framed as an issue of fact for a jury—fails to encompass contextual factors that may place the challenged statement squarely within the scope of protection afforded by the First Amendment. *See Potomac Valve*, 829 F.2d at 1288; *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302-03 (8th Cir.) (en banc), *cert. denied*, 479 U.S. 883 (1986). Standing alone, *Hepps* would require a distinction between fact and opinion under the First Amendment, but would allow the distinction to turn on a criterion unresponsive to First Amendment interests.

Milkovich is flatly wrong in his suggestion that the wealth of authority inspired by *Gertz* should be discarded through a retraction from the constitutional principle Justice Powell identified. Where, as here, the opinion in question concerns a public figure in the midst of ongoing controversy, "the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984).

The Court's commitment to the protection of opinion in the context of public figures and public controversies was reiterated as recently as 1988, in the unanimous decision in *Hustler*. Noting that "the free flow of ideas and opinions on matters of public interest" lies at the heart of the First Amendment, Chief Justice Rehnquist wrote: "We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The First Amendment recognizes no such thing as a 'false' idea." 485 U.S. at 50-51

(citing *Gertz*, 418 U.S. at 339, and *Bose*, 466 U.S. at 503-04).

As discussed below, the instant case presents no occasion for a retreat from these sound principles.

IV. THE NEWS-HERALD COLUMN WAS AN EXPRESSION OF OPINION FULLY PROTECTED UNDER THE FIRST AMENDMENT.

In the second and third subsections below, the News-Herald column is analyzed in terms of its factual content and contextual framework, an analysis that clearly qualifies it for protection under the First Amendment. Yet the language at issue is not an isolated reference in an otherwise unrelated discussion, but rather an integral part of a cohesive essay with a single subject and an identifiable thesis. Whether its content is an assertion of fact or an expression of opinion is most readily demonstrated by the column as a whole.

A. The Views Expressed Were Unmistakably Those of the Author.

Though the focuses of perspective have varied, every approach to the fact/opinion distinction has attempted to answer an underlying dispositive question: whether readers would view the statement as an assertion of fact or, conversely, an expression of opinion. *See, e.g., Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985); *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977). In the present case, no one who read the News-Herald column could have taken it as an impartial reporting of objective fact. Rather, the views expressed were unmistakably those of sportswriter Diadiun, heavily laden with emotional reaction and moral judgment.

The events surrounding the altercation at the Mentor-Maple Heights wrestling meet had been the subject of ongoing controversy throughout Ohio, and particularly so in the two communities whose wrestling teams were involved. In the News-Herald, which serves the Mentor

community, Diadiun had written a series of articles on Milkovich's active involvement in the altercation. (J.A. 161) The matter had apparently been settled by the Ohio High School Athletic Association (OHSAA), which disqualified the Maple Heights team from the state tournament and censured Milkovich, the Maple Heights coach, for his actions during the meet. (J.A. 131, 132) All of this was apparently undone, however, when the Franklin County Court of Common Pleas overturned the OHSAA orders on due process grounds.

Commenting on the court decision the very next day, Diadiun's purpose was not to explain the legal technicalities of the due process issue or the legal effect of Milkovich's testimony. Rather, his stated concern was with the moral dilemma that arises when persons responsible for the education of children are "called on the carpet" for their own conduct. In Diadiun's words:

> [T]here is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.
>
> When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.
>
> There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Milkovich, the wrestling coach, and Scott, the superintendent of schools, were faced with just such a dilemma when the events surrounding the wrestling meet were investigated by the OHSAA. Maple Heights wrestlers and hometown partisans had reacted to the disqualification of a Maple Heights wrestler by physically attacking the Mentor team, "in a brawl which sent four Mentor wrestlers to the hospital." Testifying before the OHSAA, Milkovich and Scott had a difficult choice. Seeking to exculpate Maple Heights would exemplify avoidance of responsibility instead of acceptance of it—precisely the opposite of the lesson educators are supposed to teach. Failing to do so, on the other hand, could lead to the disqualification of Maple Heights from the state wrestling finals (the result ultimately ordered by the OHSAA). (J.A. 287)

In Diadiun's view, the two men made the wrong choice, thereby setting a poor example for the students. (J.A. 287) Here again, Diadiun's point was not the specific content or legal effect of the testimony before the OHSAA, but rather the moral overtones of the situation:

> [T]hey declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible position of superintendent of schools.
>
> Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence but, incredibly, shift the blame of the affair to Mentor.

Morality had been vindicated, in Diadiun's view, by the OHSAA decision to censure Milkovich and disqualify the team notwithstanding the attempted exculpation:

> Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.
>
> Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike, Jr.

(the Maple Jaycee (sic) coach), on two-year probation.

The moral vindication Diadiun saw in the OHSAA decision turned out to be short-lived, however, in that the court of common pleas overturned the OHSAA ruling and lifted the sanctions that had been imposed on the Maple Heights team. (J.A. 175) Commenting on the lesson young people would learn from this turn of events, Diadium was critical of Milkovich and Scott for what he perceived to be their continued and ultimately successful effort to shift the blame:

> [T]he judge bought their story, and ruled in their favor.
>
> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
>
> But they got away with it.
>
> Is that the kind of lesson we want our young people learning from their high school administrators and coaches?
>
> I think not.

In both its specific content and its overall tenor, Diadiun's column was not an impartial report of objective fact but rather an essay on the moral responsibilities of high school educators. He was concerned not so much with what had happened but why it had happened, and with the broader ramifications of the situation in the minds of the young people it would influence. Emotionally charged and judgmental in its tone, the column could not conceivably be understood as anything other than the personal and subjective views of the writer.

B. The Column Did Not Imply the Existence of Undisclosed Defamatory Facts.

The concern expressed by the Restatement (Second) of Torts is whether a writing, though phrased as opinion,

implies the existence of undisclosed defamatory facts.[11] The rationale is that the reader will assume the existence of the undisclosed facts and give more credence to the writer's opinion than it would otherwise receive. The present case involves no such concern.

As discussed above, Diadiun's comments were unmistakably opinionated and judgmental in their overall content and tone; except for the opening paragraph that reported the outcome of the court decision, there is nothing that a reader could interpret as something other than Diadiun's personal views. For purposes of analysis, however, two conclusions or inferences on Diadiun's part can be identified:

(a) that Milkovich and Scott had misrepresented the facts in their testimony before the OHSAA; and,

(b) that "by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed," such that "[a]nyone who attended the meet, whether he be from Maple Heights, Mentor or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."

The basis for each of these opinions is fully disclosed in the column.

1. *The OHSAA Hearing.*

Diadiun had attended both the wrestling meet and the OHSAA investigation (J.A. 164, 185); he had personally witnessed Milkovich's conduct during the meet, and he had heard Milkovich's description of those events before the OHSAA. (J.A. 167) His conclusion that Milkovich misrepresented the facts before the OHSAA was based

---

[11] Restatement (Second) of Torts § 566 (1977) (discussed *infra* at 41-43), which provides that: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."

upon two factors, both of which he disclosed to the reader:

a. *The inconsistency between Milkovich's OHSAA testimony and the actual events of the meet.* As Diadiun saw it, Milkovich had made "wild gestures during the events leading up to the brawl," "ranting from the side of the mat and egging the crowd on against the meet official and the opposing team." In his OHSAA testimony, however, Milkovich characterized the gestures as "shrugs" and claimed that he was "[p]owerless to control the crowd." (J.A. 16, 17; Diadiun Depo., R. 1042, 1065).

b. *Milkovich's motive to deny the actual events.* As described in the column, Milkovich had been "called on the carpet to account for the incident" by the OHSAA. The consequences he faced were both disclosed in the column and well-known to Diadiun's readers: both Milkovich and his son, the junior varsity coach, had been placed on "two-year probation" for their conduct during the meet, and the Maple Heights team had been suspended from the state tournament. (J.A. 131, 132)

Based on these observations, two inferences were possible. On the one hand, Milkovich could have been honestly mistaken in his OHSAA testimony. He might have believed, as implausible as such a belief might have been, that he had not even seen a fight, or that his words and gestures had nothing to do with its outbreak. Or he could have intentionally misrepresented the events in an attempt to exculpate himself and his team and "shift the blame of the affair to Mentor."

Diadium drew the latter inference, disclosing his reasons to the reader.[12] (J.A. 175)

---

[12] Even assuming that Diadiun's characterization of Milkovich's conduct at the wrestling meet was a factual assertion ultimately provable to be inaccurate, the inaccuracy of this supporting basis would not make Diadiun's opinion concerning the OSHAA testimony any less an opinion; it would not convert the opinion itself into an assertion of fact. Only the characterization of the conduct during the wrestling meet would be actionable. Restatement (Second) of Torts § 566, at Comment c(1) (1977) ("If the defendant bases his expression of a derogatory opinion . . . on his own statement of false and defamatory facts, he is subject to liability for the factual statement but not for the expression of opinion."). *See also Stevens v. Tillman*, 855 F.2d 394, 400 (7th Cir. 1988) (discussing Illinois law) ("When a statement in the form of an opinion discloses the defamatory facts . . ., it is not actionable apart from those facts.").

2. ***The Court Hearing.***

Diadiun had not been present at the subsequent court hearing and claimed no personal knowledge of it. His only basis for commenting on what had occurred at the hearing was the information he had acquired from others (J.A. 173-175), all fully disclosed in his column:

a. *The result of the OHSAA hearing.* As discussed in the column, the OHSAA had not been persuaded by the attempted exculpatory testimony. Notwithstanding the Milkovich-Scott version of the meet, they had voted to suspend the Maple Heights team from the state tournament and to censure Milkovich and his son for their own conduct. (J.A. 131, 132)

b. *Dr. Meyer's description of Milkovich's testimony before the court.* Dr. Harold Meyer, the OHSAA Commissioner, had attended the court hearing and had commented to Diadiun on Milkovich's testimony. As reported in the column:

> "I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who had attended the hearing. "It certainly sounded different from what they told us." (R. 51)

c. *The result of the court hearing.* After a hearing in which Milkovich and Scott testified, the common pleas court entered a temporary injunction that lifted the sanctions imposed by the OHSAA.

As noted above, Diadiun believed that Milkovich and Scott had misrepresented the facts during the OHSAA investigation. (J.A. 175) Though their attempt at ex-

culpating Maple Heights had been unsuccessful before the OHSAA, their court testimony had resulted, as Diadiun understood the sequence of events, in a ruling "in their favor." [13] From Dr. Meyer's advice that the two men had changed their testimony from one appearance to the other, Diadiun reasonably inferred that "by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them."

Diadiun's personal reaction was summed up in the following words, heavily laden with subjective, emotional content:

> Anyone who attended the meet, whether he be from Maple Heights, Mentor or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

Whether Diadiun's impression was accurate or inaccurate is known only to Milkovich and Scott, and may well be subject to honest disagreement on the part of others who attended the meet. In terms of the column, however, it would be unfair to characterize Diadiun's statement as anything other than an expression of his own opinion—an inference drawn from reasons fully disclosed to the reader.

C. In Their Intrinsic and Extrinsic Contexts, the Challenged Statements Would Clearly Be Understood as Expressions of Opinion.

As discussed below, most courts have not limited themselves to the mechanical and often artificial methodology of the Second Restatement. Rather, they have considered

[13] Diadiun, a sportswriter, did not understand the legal technicalities of the due process issue. He believed that the judge's ruling involved "fault-finding" with regard to Milkovich's co[illegible]at the wrestling meet. (J.A. 170)

the "totality of the circumstances" to determine whether the challenged statements, in their intrinsic and extrinsic contexts, would be taken by readers as assertions of fact or expressions of opinion. *See, e.g., Ollman*, 750 F.2d at 979. Applying the "totality of circumstances" test to the News Herald column, the Ohio Supreme Court concluded that the column's readers would interpret its content as an expression of the heart-felt opinion of the author, and not as an impartial reporting of objective fact.[14] *See Scott*, 25 Ohio St. 3d at 253-54, 496 N.E.2d at 708-09.

In reference to the first factor in the *Scott/Ollman* analysis, the Ohio Supreme Court found that the "common meaning" of part of the column was that Milkovich had lied under oath. The court recognized that such statements will often constitute actionable libel, notwithstanding the constitutional protection of opinions. 25 Ohio St. 3d at 250-51, 496 N.E.2d at 706-07.

The court also sided with Milkovich under the second factor—i.e., "whether the statement is verifiable." In the court's view, the implication that Milkovich had lied under oath could be objectively verified, albeit through "a perjury action with evidence adduced from the transcripts and witnesses present at the hearing." [15] 25 Ohio St. 3d at 252, 496 N.E.2d at 707.

Consistent with federal precedent, however, the *Scott* court recognized that contextual analysis is also impor-

[14] Milkovich complains that the *Scott* decision represents a "vapid meaningless test" that "make[s] every statement of fact an opinion in every case." Brief of Petitioner at 32. Yet Milkovich agrees that the fact/opinion distinction requires "a reasonable contextual analysis considered from the perspective of the average reader." *Id.* at 28. Applying just such an analysis, the *Scott* court evaluated the News-Herald Column in a balanced and narrowly-drawn opinion.

[15] In light of these findings, the *Scott* decision will hardly encourage the news media to believe that defamation allegations will be taken lightly by Ohio courts. *Scott*'s four-part standard will prompt the lower courts to evaluate such allegations with careful scrutiny, giving appropriate weight to the "common meaning" and "verifiability" of allegedly defamatory statements.

tant, because a statement appearing factual and verifiable in one context will clearly be taken as an expression of opinion in another. *Scott*, 25 Ohio St. 3d at 250, 496 N.E.2d at 706. *See Ollman*, 750 F.2d at 978-79; *Greenbelt Coop. Pub. Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13 (1970); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974). Considering the third factor—i.e., "the larger objective and subjective context of the statement"—the *Scott* court noted that "[o]bjective cautionary terms, or 'language of apparency' places a reader on notice that what is being read is the opinion of the writer." 25 Ohio St. 3d at 252, 496 N.E.2d at 707.

Here again, though, the *Scott* court made no sweeping pronouncements and left no gaping doors. In the court's view, such terms as "in my opinion" or "I think," though strongly suggestive of opinion, "are not dispositive, particularly in view of the potential for abuse." 25 Ohio St. 3d at 252, 496 N.E.2d at 707. Echoing the *Ollman* case and Judge Friendly's opinion in *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 64 (2d Cir. 1980), the court observed that no "bright-line rule of labeling a piece of writing 'opinion' can be a dispositive method of avoiding judicial scrutiny." 25 Ohio St. 3d at 252, 496 N.E.2d at 707. The cautionary language of the *Scott* opinion underscored the narrowness of its holding.

Though the labeling was "not dispositive" in the court's view, Diadiun's column was clearly identified as commentary. The large caption contained, in bold letters, the phrase "TD says," and this advice was repeated in the second headline of the column ("Diadiun says"). More importantly, the obvious purpose of the column was not to accuse Milkovich of perjury, but rather to express the author's outrage that persons responsible for the education of children would attempt to avoid responsibility for their own conduct. Having personally witnessed the altercation at the wrestling meet and having heard the original testimony before the Ohio High School Athletic

Association, Diadiun believed that Milkovich and Scott should have admitted their culpability, and thus that their successful attempt to avoid responsibility at the later court hearing was disingenuous and irresponsible. In the Ohio Supreme Court's words:

> The article goes on to reinforce this [Diadiun's] concern that those in positions of authority, at any level, also occupy positions of responsibility requiring candor should that authority be called into question. The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun's having witnessed the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie.

Scott, 25 Ohio St. 3d at 252, 496 N.E.2d at 707-08.

Indeed, the entire thrust of the column was not an objective reporting of facts but rather a subjective reaction to the turn of events. That the reader would understand its content in these terms was recognized by the Ohio Supreme Court as follows:

> The strongest statement made in the article, "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, *knows in his heart* that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth" (emphasis added), further indicates that the question of whether or not a lie was actually made is ultimately a subjective determination. While Diadiun's mind is certainly made up, the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury.

25 Ohio St. 3d at 253, 496 N.E.2d at 708 (emphasis by the court).[16]

---

[16] The *Scott* court was also influenced by the fact that Diadiun's column appeared in the sports section, "a traditional haven for

Implicit in the court's reasoning was a recognition that the central theme of Diadiun's criticisms did not involve a matter of objectively verifiable fact. The day before the column appeared, Maple Heights team members and their parents—supported by the testimony of Milkovich and Scott—had succeeded in reversing the sanctions previously imposed by the Ohio High School Athletic Association as a result of the fight. Diadiun's objection did not concern the specific content of the testimony, but rather the degree to which Milkovich and Scott had admitted responsibility or sought to avoid it, and the broader ramifications of their conduct in light of their positions at the high school. This was inherently a subjective judgment. It was, in fact, a subject of ongoing controversy in both the public forum and the media, a controversy on which Diadiun—and the Mentor community in general—had strong opinions.

Against this background, the Ohio Supreme Court reasonably concluded that Diadiun's readers would not accept specific statements in the column as objective fact, but rather would evaluate them in the rhetorical context in which they were made. 25 Ohio St. 3d at 252-54, 496 N.E.2d at 707-709.

V. THE DISTINCTION BETWEEN ACTIONABLE FACT AND CONSTITUTIONALLY PROTECTED OPINION SHOULD REFLECT THE CORE VALUES OF THE FIRST AMENDMENT.

In light of the constitutional foundation on which the fact/opinion distinction rests, its objective should be to determine whether the challenged statement "implicates core values of the First Amendment." *Janklow*, 788 F.2d at 1304. First Amendment considerations are absent from some of the recognized tests and only implicitly recognized in others. Indeed, some courts have cautioned

---

caioling, invective, and hyperbole." 25 Ohio St. 3d at 253, 496 N.E.2d at 708. *See Janklow*, 788 F.2d at 1303 ("social context . . . focuses on the category of publication, its style of writing and intended audience").

that no single test can incorporate all of the constitutional considerations implicit in the fact/opinion distinction, noting that "[t]he potential for erroneous condemnation of harmless or beneficial speech should make courts reluctant to embrace unstructured, multi-factor 'tests.'" *Stevens*, 855 F.2d at 399. Still, each of the recognized tests has at least limited usefulness in identifying constitutionally protected opinion.

A. Verifiability.

One approach is the test of "verifiability." Verifiability attempts to separate fact from opinion on the basis of whether the challenged statement is capable of being proven true or false.

The verifiability test readily identifies those opinions that spring solely from emotion or sentiment. Whether a work of art is beautiful or appealing is a concept having no single definition; it is meaningless to speak of such statements as being true or false. *See, e.g., Mr. Chow of New York*, 759 F.2d at 219 (judgments based on personal tastes are not capable of being proven true or false).

When applied to a statement having both subjective and objective components, however, verifiability promotes artificial categorization and disregards contextual factors that may firmly establish the "opinion" character of the statement in the mind of the reader. A critical commentary may speak about actions or events, though the critique as a whole may reflect only the inference or judgment of the commentator. *Stevens*, 855 F.2d at 398 ("Every statement of opinion contains or implies some proposition of fact, just as every statement of fact has or implies an evaluative component."). A commentator's conclusion, if viewed in isolation, may seem to be provable or disprovable on the basis of objective evidence. Taken in context, however, the conclusion may be readily understood to represent only the personal view of the commentator with which the reader is free to agree or disagree. To make such a statement out of context and eval-

uate it solely on the basis of verifiability would ignore the subjective, opinionated aspect of its source and effect. *See Potomac Valve*, 829 F.2d at 1289-90.

Recognizing the inadequacy of the verifiability test in such instances, some courts have attempted to solve the problem within the concept of verifiability itself.[17] Other courts have been unwilling to tinker with the traditional determinant of verifiability—i.e., whether the challenged statement can be framed as an issue of fact for a jury.[18] —and instead have confronted head-on the inherent in-

[17] For example, some courts have drawn a distinction between accusations of physical misconduct and statements concerning veracity, motive, or state of mind, finding the latter to be nonverifiable. *See, e.g., Janklow*, 788 F.2d at 1304 ("the singling out of impermissible motive is a subtle and slippery enterprise, particularly when the activities of public officials are involved"). *See also Mr. Chow of New York*, 759 F.2d 219 (2d Cir. 1985). Comparing its own decisions in *Edwards v. National Audubon Society*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977), and *Cianci*, 639 F.2d 54 (2d Cir. 1980), the Second Circuit observed that in *Cianci* "we held that direct accusations of criminal misconduct . . . are not protected as opinion," while in *Edwards* "we held that [the epithet 'liar'] 'merely expressed the *opinion* that anyone who persisted in misusing Audubon statistics after being forewarned could not be intellectually honest.'" 759 F.2d at 225 (emphasis by the court).

[18] Subtle refinements of the verifiability concept were suggested by Judge Bork in his concurring opinion in *Ollman*, 750 F.2d at 1005-08. He acknowledged that the statement there at issue—"[Professor] Ollman has no status within the profession"—was capable of being framed as a jury issue. Yet the evidence that would be offered to prove or disprove the statement would itself reflect the subjective judgments of those who were called to testify, such that "the jury would be left with contradictory opinions about opinions." 750 F.2d at 1008. Judge Bork's conclusion that the statement at issue was not truly verifiable has much to say about the adequacy of verifiability as a criterion for identifying constitutionally protected opinion: "[T]he opinion-fact division serves a purpose by confining the category of actionable statements to those which lend themselves to competent judicial resolution of the truthfulness of their content. Viewed from that juridical perspective, the statement in question here is qualitatively more like an opinion than a fact. It is simply not fit for jury determination." 750 F.2d at 1006 (Bork, J., concurring).

adequacy of verifiability as a sole criterion for identifying constitutionally protected opinion. In *Potomac Valve*, for example, Judge Wisdom rejected the proposition that "statements of intention or motive are inherently unverifiable":

> The question of verifiability is ultimately relevant only insofar as it preserves the truth defense and protects statements which the ordinary reader or listener would recognize as incapable of positive proof. These purposes are *not* served by considering psychological and epistemological doubts that would ultimately threaten the entire concept of defamation.

829 F.2d at 1289 (emphasis by the court).

Yet the statement at issue in *Potomac Valve* was readily identifiable as opinion notwithstanding its facial "verifiability." 829 F.2d at 1289-90. In Judge Wisdom's view, verifiability is useful in identifying wholly subjective statements incapable of objective proof, but cannot alone encompass the full breadth of expression protected by the First Amendment:

> Even when a statement is subject to verification, . . . it may still be protected if it can best be understood from its language and content to represent the personal view of the author or speaker who made it. Thus, we reject the suggestion . . . that any "question of fact" which can be decided by a jury can be actionable as defamation. Such a test ignores the underlying purposes of the fact/opinion distinction, and would lead to results that could not be reconciled with the developing case law in other circuits.

829 F.2d at 1288.[19] Under *Potomac Valve*, verifiability finds its proper place in the fact/opinion dichotomy; it is

[19] Judge Wisdom referred specifically to the Eighth Circuit's decision in *Janklow*, 788 F.2d 1300. Troubled by the recognition that questions of motive or intent are frequently determined by a jury, the Eighth Circuit cautioned that merely categorizing a statement as involving an "issue of fact" inadequately responds to the First Amendment interests on which the fact/opinion distinction is con-

not the sole criterion for identifying constitutionally protected opinion, but rather "a minimum threshold issue." 829 F.2d at 1288.

The present case illustrates the difficulty of distinguishing fact from opinion on the basis of verifiability alone. Milkovich cites the following statement from the News-Herald column as the one most injurious to him:

> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

If the statement were to be viewed as simply a factual assertion that Milkovich lied under oath, its truth or falsity could be framed as an issue of fact for a jury. Yet the issue, thus framed, would be narrower than the one raised by sportswriter Diadiun in his commentary. In its actual context, Diadiun's statement was heavily laden with subjective, emotional content ("[a]nyone who attended the meet . . . knows in his heart"). Even this does not encompass the central point Diadiun was attempting to make, which concerned the moral lessons of the situation for the students it would influence.

At worst, Diadiun's words contained a factual component deeply buried in the emotional framework of pure opinion. To take the factual component out of context and subject it to the test of truth or falsity would ignore both the opinion character of the framework and the subjective judgment that was its central theme. Such an approach would give no consideration to whether the

---

stitutionally based: "There is a sense in which one's intention or motive in performing a certain act is properly categorized as 'fact.' . . . But the term 'fact' need not have the same meaning in every legal context. The meaning we give to it should depend on the purposes of the law being applied. Here, that law is the First Amendment, which in the most uncompromising terms ('Congress shall make no law . . .') seeks to protect freedom of speech." 788 F.2d at 1302.

column's readers would accept Diadiun's comments as an objective reporting of known fact, or discount them for the opinionated essay they rather obviously were.

More importantly, using verifiability as a sole criterion would leave First Amendment interests entirely out of the equation; no consideration would be given to whether Diadiun's comments fell within the realm of legitimate debate on what was unquestionably a matter of public concern. As the Supreme Court of Alaska observed in *Pearson v. Fairbanks Publishing Co.*:

> The basis for [the protection of opinion] is that it is in the public interest that there be reasonable freedom of debate and discussion on public issues. One should not be deterred from speaking out through the fear that what he gives as his opinion will be construed by a court as inferring, if not actually amounting to, a misstatement of fact.

413 P.2d 711, 714 (Alaska 1966) (quoted by Judge Bork in his concurring opinion in *Ollman*, 750 F.2d at 1001 n.6).

B. The Second Restatement Approach.

The recognition that verifiability is of little usefulness beyond the identification of purely subjective statements has prompted the courts and commentators to examine other bases that distinguish fact from opinion in the mind of the reader. One answer was proposed in section 566 of the Restatement (Second) of Torts, which provides that:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.

Restatement (Second) of Torts § 566 (1977).

The Second Restatement attempts to measure the likelihood that the reader would accept the statement in ques-

tion as a representation of objective fact. As the Ninth Circuit has observed in reference to section 566:

> The rule derives from the statement's effect on the reader. If an expression of opinion follows from non-defamatory facts that are either stated or assumed, the reader is likely to take the opinion for what it is. Indeed, the reader is free to form another, perhaps contradictory opinion from the same facts. But when the opinion derives from unstated or unassumed facts, the reader can only presume that the publisher of the statement is asserting the facts to support the opinion as well. Thus, the effect is the same as if the unstated facts were specified . . .

Lewis v. Time Inc., 710 F.2d 549, 555 (9th Cir. 1983).

The Second Restatement achieves a certain degree of simplicity and workability. It answers the problem of factual assertions preceded by "I think" or "I will;" mere labelling would not ensure protection, for in many instances the resulting "opinion" would strongly imply the existence of undisclosed defamatory facts. At the other end of the spectrum, the Second Restatement would afford a commentator appropriate latitude to draw inferences or conclusions from stated or generally known premises. Unless unstated (and unknown) facts are implied, the conclusions themselves would be protected, though the stated premises may be actionable if defamatory. Restatement (Second) of Torts § 566, at Comment c ("If the defendant bases his expression of a derogatory opinion . . . on his own statement of false and defamatory facts, he is subject to liability for the factual statement but not for the expression of opinion.").

Despite its facial simplicity, the Second Restatement is subject to justifiable criticisms. Identifying inferences and supporting premises entails a mechanical dissection of a statement into its component parts. The result of this analysis may only artificially reflect the substance of the statement—an after-the-fact representation indirectly correlated with the thought processes of the speaker or writer.

More importantly, the Second Restatement may underprotect opinion in many instances. Focusing on whether an expression of opinion implies the existence of unstated facts, the Second Restatement ignores other contextual factors, both intrinsic and extrinsic, that may signal to the reader that the statement in question is merely the personal view of the author. *See Ollman*, 750 F.2d at 985 ("disclosure of facts in the surrounding text is not the *only* signal that hard facts cannot reasonably be inferred from a statement").

In the present case, as discussed above, the News-Herald column fully satisfies the Second Restatement. Diadiun's view that Milkovich misrepresented the events of the wrestling meet before the OHSAA was based on reasons fully disclosed to the reader, most particularly the observation that Milkovich's "wild gestures" were passed off as "shrugs." Similarly supported were Diadiun's comments about the subsequent court hearing, which were based almost entirely on the statement of Dr. Meyer, the OHSAA commissioner, that "some of the stories told to the judge sounded pretty darned unfamiliar." There is no implication that Diadiun's views were based upon additional factors unstated in the column. Indeed, Diadiun himself had not even attended the court hearing.

That the column would be taken as opinion by its readers is most clearly evident, however, from factors other than the disclosure of supporting facts. The labelling of the column, its frequent use of words of apparency, its judgmental tone and moral commentary—all of these would signal to the reader that Diadiun's views were subjective and emotional (and not necessarily right). The reader would also be strongly influenced by the knowledge that Diadiun's views concerned a matter of ongoing controversy in the public forum—a First Amendment consideration only implicitly recognized under the Second Restatement.

C. The Totality of Circumstances.

Recognizing the limitations of the Second Restatement, most courts have opted, alternatively or additionally,[20] for a four-part "totality of circumstances" test that attempts to incorporate all relevant considerations. Identified in *Ollman*, the four pertinent inquiries are:

(1) What is the common usage or meaning of the specific language used? If the language used has a precise and understood meaning, readers are more likely to conclude that the statement is factual;

(2) Is the statement capable of being objectively verified? If not, a reader is less likely to believe that it has specific factual content;

(3) What is the "full content" of the statement? The unchallenged language around the defamation may influence a reader's "readiness to infer that a particular statement has factual content";

(4) What is the broader context or setting in which the statement appears? This factor applies because "[d]ifferent types of writing have . . . widely varying social conventions which signal the reader of the likelihood of a statement being fact or opinion."

750 F.2d at 979.

The first factor of the *Ollman* test incorporates the primary function of verifiability. If a statement has no specific or commonly accepted meaning, it cannot be proven true or false and thus cannot be the subject of a defamation action. The focus in *Ollman*, however, is not

[20] Some courts have used the Second Restatement approach to supplement contextual analysis, *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987) (opinion by Kennedy, J.), or as an additional consideration *after* contextual analysis, *Lauderback v. American Broadcasting Companies*, 741 F.2d 193, 198 (8th Cir. 1984). The *Ollman* court believed it unnecessary to consider the Second Restatement as a separate issue, concluding that factors bearing upon whether a challenged statement implies undisclosed facts are implicitly taken into account under its four-part analysis. *Ollman*, 750 F.2d at 985.

on a semantic categorization of the statement, but simply on whether the terminology would suggest objective factual content to the reader.

The second factor revisits the broader question of objective verifiability, though also with a different focus. Recognizing that "[s]tatements made in written communication or discourse range over a broad spectrum with respect to the degree to which they can be verified," the *Ollman* court did not view the question of verifiability as dispositive in and of itself; verifiability is simply another factor to be considered in determining whether a reader would regard the challenged writing "as conveying actual facts." 750 F.2d at 981-82.

The *Ollman* court rejected the notion that opinion and fact can be distinguished on the basis of a single, mechanical formula. The second and third factors in the *Ollman* analysis therefore consider the intrinsic and extrinsic context in which the challenged statement appears. The overall objective is to examine "the totality of the circumstances . . . in assessing whether the average reader would view the statement as fact or, conversely, opinion." 750 F.2d at 979.

The appropriateness of contextual analysis as a guide to assessing the effect of a writing on the average reader has been recognized in numerous decisions of this Court and the various Circuits. *Letter Carriers*, 418 U.S. at 284-86; *Greenbelt*, 398 U.S. at 13-14. As the Ninth Circuit has observed, "even apparent statements of fact may assume the character of statements of opinion, . . . when made in public debate, heated labor dispute, or other circumstance in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole." *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980).

When the subject of the statement is a public figure or a matter of public concern, this too should be considered

in evaluating whether the statement is fact or opinion. The controversial context of a writing strongly influences the reader's perception of it, as Judge Bork observed in his concurring opinion in *Ollman*: "When we read charges and countercharges about a person in the midst of . . . controversy we read them as hyperbolic, as part of the combat, and not as factual allegations whose truth we may assume." 750 F.2d at 1002 (Bork, J., concurring).

Failing to consider this aspect of context would leave the underlying values of the First Amendment out of the equation. In *Janklow*, for example, the Eighth Circuit spoke of "the public or political arena" as an essential aspect of context, to be considered as a fifth factor in the *Ollman* analysis:

> It is true that the distinction between public and private figures which bears so heavily in many libel cases has no direct relevance here; no opinion is actionable, whether it concerns a private person or a public figure. However, when determining initially whether a statement is fact or opinion, it does a disservice to the First Amendment not to consider the public or political arena in which the statement is made and whether the statement implicates core values of the First Amendment.

788 F.2d at 1303 (citations omitted).

The "public context" of a statement should be accorded great weight in identifying constitutionally protected opinion, commensurate with the importance of such considerations in other First Amendment contexts. *See Stevens*, 855 F.2d at 299-400; *Hotchner v. Castillo-Puche*, 551 F.2d 900, 913 (2d Cir. 1977). As Justice O'Connor wrote in *Hepps*, "where the scales are in . . . an uncertain balance, we believe that the constitution requires us to tip them in favor of protecting true speech . . . [t]o ensure that true speech on matters of public concern is not deterred." 475 U.S. at 776.

In *Scott*, the intrinsic and extrinsic contexts of the News Herald column were examined exhaustively by the Ohio Supreme Court. Every contextual factor supported the court's conclusion that the column would be viewed as opinion by the average reader. The caption of the column ("Diadiun says"), its placement on the sports page, the frequent use of words of apparency, the moral judgment of its central theme—these points and others convinced the court that "the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury." Even the suggestion that Milkovich had lied at the court hearing was conveyed in subjective, emotional terms—a heart-felt conviction as opposed to an objective fact. As the *Scott* court correctly concluded:

> The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun's having witnessed the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie.

Scott, 25 Ohio St. 3d at 252, 496 N.E.2d at 707-08.

Though not discussed explicitly in *Scott*, the broader context of the column demonstrates that its protection as opinion was consistent with the "core values of the First Amendment." *See Janklow*, 788 F.2d at 1303. Milkovich, a nationally known coach, was the central figure in a controversy that had raged for almost a year. He had been roundly criticized for his conduct during the wrestling meet, and had indeed been "called on the carpet" by the OHSAA. Its written censure of Milkovich left no doubt as to his personal responsibility for the incident:

> From the reports studied by the State Board they were of the unanimous opinion that *you were derelict in your responsibility* to insure that members of your wrestling team conducted themselves the way high

> school athletes are expected to. There was a distinct feeling that if you had taken proper precautions your team would not have become involved with the Mentor High wrestlers. Coaches have a great responsibility in crowd control and it all begins with, first of all, *controlling yourself* and members of your team and if this is done in a proper manner crowd control then becomes a very minor problem.

J.A. 130 (emphasis added).

Against this background—all widely reported—the reversal of the OHSAA's orders by the common pleas court came as a shock to sportswriter Diadiun. Writing for the Mentor community whose wrestlers had been attacked at Maple Heights, Diadiun reacted strongly and emotionally to what he perceived as a successful effort on the part of Milkovich and Scott to avoid the consequences of the OHSAA's findings. In Diadiun's view, Milkovich and Scott had acted irresponsibly as educators, setting a poor example for the students.

That his views were expressed in strong terms was a natural consequence of heated debate—an understandable manifestation of his own emotions. As Chief Justice Rehnquist wrote in *Hustler*, "criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks.'" 485 U.S. at 46 (quoting *New York Times*, 376 U.S. at 270). Such latitude must be tolerated in a free society, lest "the free flow of ideas and opinions on matters of public interest"—the cornerstone of the fact/opinion distinction—be reduced to bland generalities. *Hustler*, 485 U.S. at 50.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court dismiss the writ of certiorari on the ground that it was improvidently granted or, in the alternative, affirm the decisions of the courts below.

Respectfully submitted,

Of Counsel:
P. CAMERON DEVORE
MARSHALL J. NELSON
DONALD S. KUNZE
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150

RICHARD D. PANZA *
WILLIAM G. WICKENS
DAVID L. HERZER
RICHARD A. NAEGELE
THOMAS A. DOWNIE
WICKENS, HERZER & PANZA
A Legal Professional Association
1144 West Erie Avenue
P.O. Box 840
Lorain, Ohio 44052-0840
(216) 246-5268
Counsel for Respondents

* Counsel of Record